Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

MARVIN WARE,

Petitioner.

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether petitioner was denied fundamental due process under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), when he received a mandatory natural life sentence for his conviction of aggravated criminal sexual assault because he had a prior conviction for the same offense. Petitioner submits that the Illinois statute at issue--720 ILCS §5/12-14(d)(2)--is unconstitutional.

THE LIST OF ALL PARTIES TO THE PROCEEDING IN THE SUPREME COURT OF ILLINOIS

The parties to the proceedings in the Supreme Court of Illinois were respondent People of the State of Illinois and petitioner Marvin Ware.

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Petitioner Marvin Ware respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Illinois in this case.

CITATION OF OFFICIAL AND UNOFFICIAL REPORTS

The decision of the Illinois Supreme Court was entered on October 3, 2001, is not officially reported, and is included in the Appendix. The decision of the Illinois Appellate Court was entered on May 22, 2001, is officially reported at 323 Ill.App.3d 47, and is included in the Appendix. The actions of the Circuit Court of Cook County, Illinois, are unreported.

JURISDICTIONAL STATEMENT

The judgment of the Illinois Supreme Court was entered on October 3, 2001. The Court's jurisdiction is invoked under 28 U.S.C. §1254(2).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states that:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces or in the militia when in actual service of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due

process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment states that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

The Fourteenth Amendment states, in part, that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall nay State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

Marvin Ware was convicted of aggravated criminal sexual assault and received a mandatory natural life sentence under §5/12-14d(2) of the Illinois Criminal Code, 720 ILCS 5/12-14(d)(2), because he had a prior conviction of the same

offense. He petitions the Court to issue a writ of certiorari from the appellate court's judgment and the Illinois Supreme Court's denial of his petition for leave to appeal.

Mr. Ware submits that §5/12-14(d)(2) is unconstitutional because it increases the penalty for an offense beyond the statutory maximum based upon facts that are not required to be pled before trial, submitted to a jury, or proven beyond a reasonable doubt, in violation of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000). The appellate court ruled that prior convictions are an exception to the rule in Apprendi and upheld §5/12-14(d)(2). People v. Ware, 323 Ill.App.3d 47, 751 N.E.2d 81 (2001). In doing so, the appellate court relied upon a series of recent Illinois decisions making similar holdings. See People v. Lathon, 317 Ill.App.3d 573, 740 N.E.2d 377 (2000); People v. Roberts, 318 Ill.App.3d 719, 743 N.E.2d (2000); People v. Ramos, 318 Ill.App.3d 181, 742 N.E.2d 763 (2000). The Court should accept this case for review to provide guidance on this issue.

STATEMENT OF FACTS

After a bench trial, the trial court found Mr. Ware guilty of aggravated criminal sexual assault. R. A143. At the sentencing hearing, the State introduced evidence that Mr. Ware had a prior conviction of aggravated criminal sexual assault from 1992. The trial court sentenced Mr. Ware to natural life in prison under 720 ILCS 5/12-14(d)(2). R. C15-16, C27-29.

On appeal, among other things, Mr. Ware argued that his extended-term sentence of natural life was based on an unconstitutional statute under Apprendi. The appellate court

rejected these contentions and affirmed Mr. Ware's sentence. Ware , supra.

ARGUMENT

MR. WARE'S ENHANCED SENTENCE IS UNCONSTITUTIONAL BECAUSE IT INCREASED THE PENALTY FOR THE UNDERLYING CRIME BEYOND ITS STATUTORY LIMIT, BUT DID NOT PLEAD THE ENHANCEMENT BEFORE TRIAL, PRESENT IT TO A JURY, OR PROVE IT BEYOND A REASONABLE DOUBT

Marvin Ware was convicted of aggravated criminal sexual assault under §5/12-14(d)(1) of the Criminal Code and received an "extended term" sentence of mandatory natural life sentence for his conviction of aggravated criminal sexual assault under 720 ILCS 5/12-14(d)(2)(1998) because he had a prior conviction for the same offense. R. C15-20, C27-29; C5, 76. Aggravated criminal sexual assault is a Class X felony with a penalty of 6 to 30 years in prison. 720 ILCS 5/12-14(d)(1)(1998); 730 ILCS 5/5-8-1(a)(3)(1998). Section 5/12-14(d)(2) imposes an "extended term" sentence of natural life in prison if the defendant has a prior conviction of aggravated criminal sexual assault, predatory criminal sexual assault of a child, criminal sexual assault, or a substantially equivalent offense. 720 ILCS 5/12-14(d)(2)(1998).

This statute violates Mr. Ware's constitutional rights to due process, fair notice, and trial by jury by permitting an increase in the penalty for an offense beyond the statutory maximum based on facts that are not required to be pled before trial, submitted to a jury, and proved beyond a

reasonable doubt. U.S. Const. Amends. V, VI, XIV; Apprendi, 530 U.S. at 490. Because §5/12-14(d)(2) is unconstitutional under Apprendi, the Court should grant review, invalidate the offensive statute, vacate Mr. Ware's life sentence, and remand the cause for a new sentencing hearing.

Our Constitution prohibits any deprivation of liberty without "due process of law" and a "speedy and public trial, by an impartial jury." Amends. 14, 6, U.S. Const. These rights entitle a criminal defendant to a "jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310 (1995).

In Apprendi, the Court struck down a New Jersey statute that allowed an extended-term sentence where a trial court finds by a preponderance of the evidence that, in committing an offense, a defendant acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity. Apprendi, 530 U.S. at 468-69. The Court held as a matter of due process that any fact, other than a prior conviction, that increases the penalty for an offense beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. Apprendi, 530 U.S. at 490. The Court ruled that these facts must be pled by the State before trial to satisfy constitutional guarantees of due process, fair notice, and trial by jury. Apprendi, 530 U.S. at 476, 490. In reaching its decision, the Court framed the issue as "whether the due process clause of the fourteenth amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense

from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." Id.

The Illinois statute at issue here bears the same constitutional defects as the New Jersey statute invalidated in Apprendi. Like the New Jersey statute, the Illinois statute permits an extended-term sentence to be imposed in violation of constitutional guarantees of due process, fair notice, and trial by jury. Section 5/12-14(d)(2) violates Apprendi because it authorizes the imposition of an extended-term sentence based upon facts regarding the existence of a prior conviction that are not required to be pled before trial, submitted to a jury, or proven beyond a reasonable doubt.

Because the statute under which Mr. Ware was sentenced subjected him to a sentence beyond the statutory maximum based on a prior conviction, this case presents an issue left open by Apprendi. The Court should grant the petition for a writ of certiorari and provide guidance to lower courts.

Enhanced sentencing based upon prior convictions are unconstitutional according to the principles of Apprendi. Mr. Ware acknowledges that, in dicta, the Apprendi Court stated that the existence of prior convictions were excluded from its general holding regarding other facts that increase the penalty for an offense beyond the statutory maximum. This exclusion does not bar Mr. Ware's claim.

Apprendi did not *hold* that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490, 120 S.Ct. at 2362-63. This

statement is merely dicta. The Court's jurisprudence on this subject consistently rests upon the principle that a sentence cannot be enhanced beyond the statutory maximum penalty of the convicted crime unless the enhancement issues are pled, presented to the jury, and proven.

Prior convictions were not at issue in Apprendi. In fact, despite its rather straightforward comment about prior convictions, the Court noted that it may expand the Apprendi holding to require pleading and proof of prior convictions in some cases. It considered Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219 (1998), which held that the failure of an indictment to allege a prior conviction that subjected a defendant to increased punishment was not a violation of due process. The Apprendi Court stated that it was arguable that Almendarez-Torres was incorrectly decided and treated it as a narrow exception limited to cases where a defendant admits his recidivism. Apprendi, 530 U.S. at 489. The instant case is outside the scope of the Almendarez-Torres exception. The Court concluded that its general holding would apply if the recidivist issue were contested. Apprendi, 530 U.S. at 489-90. In his concurrence, Justice Thomas went one step further and declared that a prior conviction, subjecting a defendant to an increased sentence, is an element of the offense and must be proven to a jury beyond a reasonable doubt. Apprendi, 530 U.S. at 501, 521 (Thomas, J., concurring).

Furthermore, in distinguishing Almendarez-Torres, the Apprendi Court recognized: "Both the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that Almendarez-Torres did not challenge the accuracy of that 'fact' in his case, mitigated the due process and Sixth Amendment concerns otherwise

implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." Apprendi, 530 U.S. at 488 , 147 L.Ed2d at 454, 120 S.Ct. at 2362. The procedural safeguards in this case do not sufficiently mitigate Mr. Ware's due process and Sixth Amendment concerns.

Although procedural safeguards may attach to the fact of Mr. Ware's record of a prior conviction, the "fact" of his recividism has not been determined with appropriate procedural safeguards in place. Mr. Ware pled guilty to the offense that now constitutes the 'fact' of his prior conviction after spending three and a half years in the County jail awaiting his trial. He was sentenced to 6 years in prison, but was released from custody on the day he entered his guilty plea. Mr. Ware waived his right to a jury trial with an understanding only of the sentence he faced for that offense. He did not knowingly, intelligently, and willingly waive his Sixth Amendment right to a jury trial where he faced life imprisonment and he did not have fair notice of the penalties that he faced.

Mr. Ware also waived his right to jury trial in the present case as well. Again, he did not do so knowingly, intelligently, and willingly. Following a bench trial, evidence of Mr. Ware's prior conviction was introduced at the sentencing hearing. Mr. Ware did not have fair notice of the penalties that he faced. Therefore, he could not waive his right to jury trial knowingly or intelligently.

MR. WARE'S ENHANCED SENTENCE IS UNCONSTITUTIONAL BECAUSE IT IS BASED UPON FACTS OTHER THAN THE EXISTENCE OF PRIOR CONVICTIONS

Section 5/12-14(d)(2) requires additional qualifying facts that go beyond the mere existence of another conviction. To make a defendant eligible for an extended-term sentence under the Illinois statute, the other conviction must have occurred before the current conviction. If the other conviction is not for one of the enumerated offenses, then the other conviction must be for an offense that is "substantially equivalent" to one of the enumerated offenses. Accordingly, even if the existence of another conviction is excluded from the general holding, these additional qualifying facts regarding the other conviction are not. As a result, they must be pled before trial, submitted to the jury, and proved beyond a reasonable doubt to satisfy the constitutional standards enunciated in Apprendi.

CONCLUSION

For the foregoing reasons, petitioner Marvin Ware respectfully requests that the Court grant the petition for a writ of certiorari, issue the writ, hear this case on its merits, invalidate the Illinois statute at issue, vacate his life sentence, and remand this case to the Illinois courts for further proceedings.

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT APPELLATE COURT FROM THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
vs.)
)
MARVIN WARE,)
)
Defendant-Appellant.)

Appeal from the Circuit Court of Cook County

No. 98 CR 24643

The Honorable William P. Prendergast,
Judge Presiding.

JUSTICE COUSINS delivered the opinion of the court: Following a bench trial, defendant Marvin Ware was convicted of aggravated criminal sexual assault and was sentenced to natural life in prison. On appeal, defendant argues that: (1) he was denied a fair trial when the trial court improperly admitted prior consistent statements; (2) his convictions should be reduced to criminal sexual assault; and (3) his natural life sentence was based on an unconstitutional statute under Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

BACKGROUND

Defendant was indicted on 10 counts, 3 of which were nol-prossed by the State before trial. The remaining counts included: two counts of aggravated criminal sexual assault, one count of criminal sexual assault, two counts of kidnapping, one count of aggravated criminal sexual abuse, and one count of unlawful restraint.

At the bench trial, C.K. testified that on August 19, 1998, around 5 p.m., she was on her way from work. She decided to stop by Bruegger's Bagel Baker, where she had previously worked, to visit former coworkers. She entered through the front of the store and saw one former coworker at the register helping customers. C.K. and defendant had previously worked together about five times. After saying "hi" to them both, C.K. began talking to defendant about her new job. As they talked, C.K. began walking down a long hallway toward the back door with defendant following behind her. She walked past the women's washroom and said that she was going home. As C.K. stood in front of the men's washroom, the defendant grabbed her arm and pulled her into the men's washroom.

C.K. stated that she was surprised and shocked. Defendant turned off the lights in the bathroom, locked the door, and pinned C.K. against the wall with her arms behind her back. C.K. tried to say "no" and "stop" but defendant had his tongue in her mouth or covered her mouth with his hand. C.K. tried to push defendant off with her body but failed.

Defendant fondled C.K.'s breasts from outside of her clothing. Defendant said, "Don't worry, I'm not going to come in you." At this point, C.K. stated that she believed that she "was being raped." Defendant unbuckled C.K.'s pants and pulled her pants and underwear down to her knees. He then unzipped his own pants and pulled out his penis. C.K. felt defendant insert his penis inside her vagina and move back and forth. After a couple of minutes, defendant suddenly pulled back and said, "Oh, shit." Defendant had ejaculated a little bit on the floor, so he turned on the light, grabbed some toilet paper and finished ejaculating in the toilet paper.

Defendant then exited the bathroom. C.K. pulled her pants and also left the bathroom. She saw the defendant standing with his back to her holding a mop bucket in his hand. C.K. left out the back door and went home. C.K. told a houseguest that something was wrong and to call her mother. C.K.'s mother came home and took C.K. upstairs. C.K. told her mother that she had been raped. Her mother would not let C.K. shower or change clothes and took her to the emergency room. At the hospital, C.K. completed a sexual assault kit. She testified that she had not had sex with anyone with 72 hours of the incident and was not sure whether defendant had ejaculated inside of her.

Nurse Delores Armstrong testified that she tended to C.K. on August 19, 1998. The physical exam revealed no vaginal trauma. Armstrong indicated it was not unusual that no vaginal trauma occurred during the rape. The vaginal and oral swabs from the sexual assault kit contained no evidence of semen. Examination by the Illinois State Police found semen on the crotch area of C.K.'s panties, though no sperm was detected and no DNA other than C.K.'s was found.

Sergeant Bruce Higgins of the Chicago police department interviewed C.K. at the hospital. He stated that C.K. appeared visibly shaken and upset and had to stop a couple of times as she threw up in a waste paper basket. She identified the perpetrator as a former coworker and indicated his first name. Higgins then proceeded to the men's bathroom of the bagel store. He testified that it was spotless, as though it had just been cleaned. The garbage can was empty and the floors were clean. Higgins checked the women's washroom and found the sink and toilet to be functioning. The police checked nine bags of garbage and recovered a lard was of toilet paper which was analyzed and found to contain no evidence of semen. Higgins obtained defendant's name and address and proceeded to his residence.

Defendant was arrested on August 20, 1998, around 1:30 a.m. Higgins interviewed defendant later that day. Defendant told Higgins that the first noticed C.K. in the bagel store when he opened the men's washroom door to 2clean it. Defendant said to C.K., "You know, why don't you use the women's washroom and get out of here?" He left her to do some other cleaning and when he came back, he found C.K. still inside the men's washroom. He yelled at her to leave and C.K. exited through the back door. When Higgins asked defendant why C.K. was in the men's washroom, defendant stated that he did not know. Following

the interview, C.K. picked defendant out of a lineup at the police station.

C.K.'s mother, Dickalon Kehrein, testified that she received a call from her houseguest on August 19, 1998, around 6 p.m. Ms. Kehrein went home immediately and found C.K. crying in the living room. She observed that C.K.'s face was red, her eyes were puffy and she was shaking. Ms. Kehrein testified that C.K. told her that she had been raped on her way home from work. Ms. Kehrein stated that C.K. said it occurred at Bruegger's Bagels where she used to work and that her attacker was a former coworker named Marvin. Ms. Kehrein then told C.K. that she should not shower and took her to the hospital.

Defendant was found guilty of two counts of aggravated criminal sexual assault predicated on unlawful restraint and kidnapping. The court indicated that while the defendant was also guilty of the other charges against him, they merged into these two counts. At the sentencing hearing, the State introduced evidence of defendant's prior conviction for aggravated criminal sexual assault. Accordingly, the court sentenced defendant to natural life imprisonment.

Defendant appeals. We affirm.

ANALYSIS

I. WITNESS TESTIMONY

Defendant claims that he was denied a fair trial because the trial court erroneously admitted the hearsay testimony of C.K.'s mother. In defendant's view, such admission impermissibly bolstered C.K.'s testimony by identifying the defendant and providing details of the occurrence. Although

defendant concedes that he failed to object at trial and failed to raise the issue in a post trial motion, he urges this court to review the claim as plain error.

The plain error doctrine may be invoked in criminal cases where: (1) the evidence is closely balanced; or (2) where the error was of such magnitude that eh accused was denied a fair trial. People v. Nieves, 192 Ill. 2d 787, 502, 737 N.E.2d 150 (2000). In our view, the evidence in this case was not so closely balanced as to warrant plain error review. Evidence supporting conviction included male semen found in C.K.'s underwear; C.K.'s prompt reporting of the incident; her upset demeanor visible to Sergeant Higgins and her mother; and the opportunity for defendant to mop up and dispose of semen in the bathroom. On the other hand, there was only defendant's statement that C.K. was in the men's bathroom of her own accord and exited after defendant yelled at her to leave. We now turn to the merits of defendant's argument to determine whether the error, if any, was "so severe that it must be remedied to preserve the integrity of the judicial process." Nieves, 192 Ill. 2d at 503.

In general, the testimony of a witness may not be bolstered by showing that she made similar statements out of court; however, a well-established exception exists for sexual assault cases where the prosecuting witness made a prompt complaint of the incident. People v. Evans, 173 Ill. App 3d 186, 199, 527 N.E.2d 448 (1988). Evidence that a complaint was made is admissible to corroborate the victim's testimony. People v. Damen, 28 Ill. 2d 464, 473-74, 193 N.E.2d 25 (1963). The sole purpose of this exception is to rebut the presumption arising from the complainant's silence. Therefore, only the fact of the complaint is admissible; neither the details of the complaint nor the identity of the named perpetrator is admissible. Damen, 28 Ill. 2d at 473-74. Additionally, any error in the admission of

hearsay testimony is ordinarily considered harmless where the testimony is supported by other corroborative evidence. Evans, 173 Ill. App. 3d at 200.

Evans and People v. Brown, 258 Ill. App. 3d 544, 630 N.E.2d 1106 (1994), are instructive. In Evans, the victim, G.B., testified that she told her friend that defendant "took advantage of [G.B.]" and also testified that she identified defendant to her friend during the conversation. Evans, 173 Ill. App. 3d at 202. The reviewing court held that the naming of defendant was improper since only the fact of the complaint, and not the details or identity of the perpetrator, is admissible. Evans, 173 Ill. App. 3d at 202. However, the court found the error to be harmless due to G.B.'s corroborative testimony:

> "(I)n light of G.B.'s positive and unwavering testimony that conclude that any impropriety in the admission of this testimony, to which the defendant made no objection, was not so harmful as to constitute plain error." Evans, 173 Ill. App. 3d at 202.

In Brown, the court held that the trial court properly admitted testimony of the victim's mother that did not contain any great detail of the incident. Specifically, the only details admitted where that men with guns took the victim's purse; that the victim was fondled and penetrated by a finger; and that a man tried to drag the victim into an alley. Brown, 258 Ill. App. 3d at 550. The court indicated that these were minimal details that showed only that the crimes occurred. Additionally, the testimony did not in fact name the offenders. Thus, the admission of the conversation between the victim and her mother was not error. Brown, 258 Ill. App. 3d at 550.

In the instant case, C.K.'s mother testified as follows:

"Q. Not getting into everything that occurred, but did you ask her what had happened?

A. Yes. I asked her right away what had happened, and she said that she had been raped on her way from work and that she had come home and that *** she needed to talk to me right away.

*** Q. Did she state where she had been raped?

A. I asked her and she said the Bruegger's Bagels, where she used to work.

Q. Did she know the individual or was she able to identify who had done this to her?

A. She said it was somebody she had worked with and I asked her who, who it was, and she said his name was Marvin, she wasn't sure what the last name was."

Unlike the victim's mother in Brown, C.K.'s mother here provided more than "minimal details that show [ed] only that crimes occurred." Brown, 258 Ill. App. 3d at 550. Thus, the admission of such testimony was error. However, like Evans, any error in the admission of hearsay testimony was harmless where the testimony was supported by other corroborative evidence - - namely, C.K.'s positive and unwavering testimony that it was defendant who raped and sexually assaulted her.

Defendant also relies upon People v. Sommerville, 193 Ill. App. 3d 161, 549 N.E.2d 1315 (1990). In

Sommerville, the trial court admitted testimony by three of the State's witnesses which bolstered the victim's credibility. The victim's boyfriend, an officer who interviewed the victim, and a nurse who treated the victim were all permitted to testify that the victim identified the perpetrator as a "black male" and also provided details of the offense. Sommerville, 193 Ill. App. 3d at 172-73. On review, the court held that the improper admission of the prior consistent statements constituted reversible error. The court of the three witnesses tended to make the jury believe the victim over the defendant. Sommerville, 193 Ill. App. 3d at 176.

Sommerville is distinguishable from the instant case. First, the court found C.K.'s testimony clear and convincing and the evidence was not closely balanced like Sommerville. Additionally, the concerns associated with the jury's reliance on prior consistent statement in Sommerville, coupled with the prosecutor's closing argument highlighting the corroborative evidence, are not present in a bench trial that did not close with such a summation. See People v. Gilbert, 68 Ill. 2d 252, 258, 369 N.E.2d 849 (1977) (trial judge is presumed to have considered only competent evidence in a bench trial).

Moreover, in rendering its decision, the court did not refer to the testimony of C.K.'s mother concerning defendant's identity or the details of incident. The court merely noted that her mother indicated that C.K. appeared visibly upset. Instead, the court relied upon the following evidence to convict the defendant:

> "I note that [C.K.] testified clearly and concisely. I note that Sergeant Higgins said that she was visibly upset. I note that her mother said that she was visibly upset. I note that even though there was

not DNA evidence, that there was evidence of semen found in her pants.

I take into *** some consideration *** that most businesses clean up *** And I note the Defendant's words, 'I will not come inside you.' For what reason is that? Obviously, you could infer from that there is an evidentiary reason. Secondly, 'Oh shit,' when the semen spilled on the floor."

In our view, defendant was not so prejudiced by the testimony of C.K.'s mother that it would have affected the outcome of the case or that it undermined the fundamental fairness of the trial. Since we conclude that defendant suffered no prejudice, his claim of ineffective assistance of counsel on this point also fails. See People v. Foster, 168 Ill. 2d 465, 475, 660 N.E.2d 951 (1995) (a court need not determine whether counsel's performance was deficient if it decides that the defendant suffered no prejudice from the alleged errors.

II. CONVICTION

Defendant was convicted on two counts of aggravated criminal sexual assault committed during the course of a felony – one count based on unlawful restraint (count I), and the other count based on kidnapping (count II). Defendant argues that his convictions should be reduced to criminal sexual assault because unlawful restraint and kidnapping are lesser included offenses. The State concedes that count I (based on unlawful restraint) merges with criminal sexual assault and kidnapping. However, the State argues that the offense of kidnapping was not incidental to the offense of criminal sexual assault and that the conviction for count II should not be reduced.

Kidnapping occurs when a person knowingly and secretly confines another against her will or by force or threat of imminent force carries another from one place to another with intent to secretly confine her against her will. 720 ILCS 5/10-1 (West 1998). To determine whether an asportation or detention rises to the level of kidnapping as a separate offense, Illinois courts have adopted the test announced in People v. Smith, 91 Ill. App. 3d 523, 414 N.E.2d 1117 (1980). A court must consider the following four factors: (1) the duration of the asportation or detention; (2) whether the asportation or detention occurred during the commission of a separate offense; (3) whether the asportation or detention that occurred is inherent in the separate offense; and (4) whether the asportation or detention created a significant danger to the victim independent of that posed by the separate offense. Smith, 91 Ill. App. 3d at 529. "Whether an asportation is sufficient to constitute a kidnapping depends on the particular fats and circumstances of each case." People v. Casino, 212 Ill. App. 3d 680, 687, 571, N.E.2d 742 (1991).

First, defendant contends that C.K.'s asportation was for an insufficient duration because she was merely taken a few feet from the hallway to the bathroom and the whole episode allegedly lasted only a few minutes. However, a kidnapping conviction is not precluded by the brevity of the asportation or the limited distance of the movement. Casiano, 212 Ill. App. 3d at 687 (victim forced to walk 1 ½ blocks knife point to defendant's apartment was sufficient asportation). Several cases are instructive. In People v. Thomas, 163 Ill. App. 3d 670, 516 N.E.2d 901 (1987), the victim was walking toward her van when two men forced her into the van and told her to lie down in the back. After the men drove the van for half a block, the victim escaped out of the back passenger panel door. Thomas, 163 Ill. App. 3d at 672-73. The court held that the brevity of the asportation did

not preclude a kidnapping conviction. Thomas, 163 Ill. App. 3d at 678.

People v. Pugh, 162 Ill. App. 3d 1030, 1035, 516 N.E.2d 396 (1987), Similarly held that an asportation/detention for a short duration did not preclude a kidnapping conviction. In Pugh, the victim walked past defendant's car when defendant got out of the care and began to beat the victim. He then dragged her into the car and forced her to lie down on the back seat as the car was driven away. Within a few minutes, a police car stopped the vehicle. Pugh, 162 Ill. App. 3d at 1031-32. Although the victim was detained very briefly in the car, the court held that it was sufficient to satisfy the duration factor. Pugh, 162 Ill. App. 3d at 1035.

In People v. Rush, 238 Ill. App. 3d 806, 808, 816-17, 606 N.E. 2d 132 (1992), the victim was standing outside the door of a cocktail lounge. Defendant grabbed the victim's arm and began to beat her. He then dragged her into an alley and forced her into the basement of an abandoned building before sexually assaulting her. Rush, 238 Ill. App. 3d at 808-10. The court rejected defendant's argument that the victim's asportation lasted an insufficient duration because she was merely dragged 50 feet and the incident only lasted five minutes. Rush, 238 Ill. App. 3d at 816-18. Similarly, in People v. Lloyd, 277 Ill. App. 3d 154, 164, 660 N.E.2d 43 (1995), the court found that the duration factor was satisfied where the asportation lasted approximately one block: the victim was taken by force from the street into an abandoned building before she was sexually assaulted.

In contrast, in People v. Lamkey, 240 Ill. App. 3d 435, 608 N.E.2d 406 (1992), the court reversed defendant's conviction for aggravated kidnapping. Lamkey involced a 10-year-old girl who was walking toward school when a man

jumped out of the doorway of a building and pulled her into a hallway. He sexually assaulted her in the hallway, which was within public view and clearly visible to anyone walking or driving down the street. In fact, a passerby in a car observed the defendant with the victim and sounded his automobile horn, causing the defendant to release the victim and run upstairs. Lamkey, 240 Ill. App. 3d at 436-37. The passerby estimated that the asportation lasted two minutes. Lamkey, 240 Ill. App. 3d at 440. The court found that the victim was not detained for a substantial period of time. It also found that the asportation did not pose a more significant danger to the victim than that already posed by the sexual assault. The court concluded that the State failed to prove that sufficient asportation occurred. Lamkey, 240 Ill. App. 3d at 440.

Here, C.K. was forced from the hallway into the men's bathroom. Like the victims in Thomas and Pugh, she was only detained for a few minutes. Although the victim in Lamkey was also detained for about two minutes, we find that case distinguishable. Unlike the hallway in Lamkey, which was clearly visible to the public and only steps away from a busy city thoroughfare, the locked bathroom here was concealed from public view. We also note that the defendant turned the bathroom light off, a fact that further hid his presence from a passerby. Also, even though the distance C.K. was taken (a few feet) was shorter than Rush (50 feet), Lloyd (one block), or Thomas (half a block), in our view, the limited distance of the movement did not preclude the finding of a separate kidnapping offense in the instant case.

Second, C.K.'s asportation occurred prior to, rather than during, the sexual assault. Courts have found that kidnapping constitutes a separate offense when the victim is transferred from one location to another before she is raped. See Lloyd, 277 Ill. App. 3d at 164 (victim's asportation from

street to abandoned building occurred prior to sexual assault); Casiano, 212 Ill. App. 3d at 687 (victim was forced from the street into defendant's apartment before she was raped); People v. Sherrod, 220 Ill. App. 3d 429, 436, 581 N.E.2d 53 (1991) (victim's asportation from the street to a garage in adjacent alley took place before the sexual assault). Similarly, here, C.K. was forced from the hallway into a locked bathroom before she was raped.

Third, the forced movement of the victim from one place to another is not inherent in the offense of criminal sexual assault. 720 ILCS 5/12-13 (West 1998); Lloyd, 277 Ill. App. 3d at 164; People v. Gully, 151 Ill. App. 3d 795, 800, 502 N.E.2d 1091 (1986).

Fourth, the asportation posed a significant danger to C.K. independent of the danger created by the sexual assault. The danger arises from the potential for more serious criminal activity due to the privacy of the final destination, the locked bathroom in the instant case. Sherrod, 220 Ill. App. At 436. In particular, a significant and independent danger arises where the victim is forced out of a public area and into a locked bathroom. Her signal for help is more difficult to detect and the likelihood that she would be observed by a passerby is greatly diminished. Lloyd, 277 Ill. App. 3d at 164-65; Sherrod, 220 Ill. App. 3d at 435-36.

In sum, the record indicates that kidnapping was not merely incidental to the sexual assault and defendant's conviction on count II was proper.

II. SENTENCE

Lastly, defendant argues that he was sentenced pursuant to an unconstitutional statute under Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct.

2348 (2000). In Apprendi, the court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490, 147 L. Ed. 2d at 455, 120 S. Ct. at 2362-63.

Defendant was convicted of aggravated criminal sexual assault committed during the course of a felony. 720 ILCS 5/12-14 (a) (4) (West 1998). Section 12-14 (d) (2) requires a court to impose a sentence of natural life imprisonment upon a repeat sex offender as follows:

> "A person who is convicted of a second or subsequent offense of aggravated criminal sexual assault *** shall be sentenced to a term of natural life imprisonment." 720 ILCS 5/12-14 (d) (2) (West 1998).

In the instant case, defendant was previously convicted of aggravated criminal sexual assault on June 20, 1996, in Illinois and sentenced to six years of prison. He was on mandatory supervised released from the Illinois State Penitentiary when C.K. was attacked. Because of his previous conviction for aggravated criminal sexual assault, the trial court was required to sentence defendant to a term of natural life. 720 ILCS 5/12-14 (d) (2) (West 1998). Defendant contends that this recidivist provision is unconstitutional because he was entitled to a trial by jury to prove the fact of his previous conviction beyond a reasonable doubt. We disagree.

Under Apprendi, prior convictions are considered an exception to the general rule that facts which increase a penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a

reasonable doubt. Apprendi, 530 U.S. at 490, 147 L. Ed. 2d at 455, 120 S. Ct. at 2361-63. Apprendi indicated that the "fact" of a prior conviction contains procedural safeguards unlike other "facts" which increase punishment beyond the statutory maximum. Apprendi, 530 U.S. at 488, 147 L. Ed. 2d at 454, 120 S. Ct. at 2362. See also People v. Lathon, 317 Ill. App. 3d 573, 740 N.E.2d 377 (2000) (general rule requiring a jury determination of fact issues for sentencing did not apply to recidivist provision under Apprendi); People v. Roberts, 318 Ill. App. 3d 719, 743 N.E.2d 1025 (2000) (defendant's sentencing as a recidivist was not subject to Apprendi rule generally requiring any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be proven to a jury beyond a reasonable doubt); People v. Ramos, 318 Ill. App. 3d 181, 193, 742 N.E.2d 763, 774 (2000) ("Apprendi clearly exempts recidivist statutes").

For the foregoing reasons, the decision of the trial court is affirmed.

Affirmed.

GORDON and McBRIDE, JJ., concur.

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
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October 3, 2001

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No. 91755 - People State of Illinois, respondent, v. Marvin Ware, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 25, 2001.